

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA v. KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN ‘ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI	AE 710B RULING Defense Motion to Compel Discovery (911 Commission Report Exhibits) 20 April 2020
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1. **Procedural History.** On 30 January 2020, Mr. Hawsawi moved the Commission to compel the Government to produce four exhibits which were referenced in the 9/11 Commission Report.¹ On 5 February 2020, the Government responded in opposition.² Mr. Hawsawi did not file a reply.

2. **Findings of Fact.** For the purposes of this motion, the Commission adopts as fact those facts asserted by the Defense in paragraph 4.a. of the motion to compel discovery. The Commission also accepts as fact those portions of paragraph 4.b. that summarize the procedural history of the discovery request in issue in the instant motion.

3. **Burden of Proof.** As the moving party, the Defense bears the burden of proving any facts prerequisite to the relief sought by a preponderance of the evidence.³

4. **Oral Argument.** The Defense requested oral argument on the motion. The Government does not request oral argument and, instead, argues that oral argument is unnecessary. In accordance with Rule for Military Commission (R.M.C.) 905(h), “[t]he military judge may, in the judge’s discretion, grant the request of either party . . . to present oral argument.” In this instance, the

¹ AE 710 (MAH), Defense Motion to Compel Discovery (911 Commission Report Exhibits), filed 30 January 2020.

² AE 710A (GOV), Government Response To Defense Motion to Compel Discovery (9/11 Commission Report Exhibits), filed 5 February 2020.

³ Rule for Military Commissions (R.M.C.) 905(c)(1)-(2).

issue has been fully briefed in the written pleadings. Oral argument is not necessary to the Commission's consideration of the issue presented.⁴ The Defense request for oral argument is **DENIED**.

5. Law - Discovery.

a. Information is discoverable if it is material to the preparation of the defense or exculpatory.⁵ Information is also discoverable if it is material to sentencing.⁶ The materiality standard is not normally a heavy burden. Evidence is material if there is a strong indication the information will "play an important role in uncovering admissible evidence, aiding in witness preparation, corroborating testimony, or assisting impeachment or rebuttal."⁷

b. A "mere conclusory allegation that the requested information is material to the preparation of the defense," however, does not satisfy the Defense's burden to show "the reasonableness and materiality of the request."⁸ Similarly, a "vague asserted need for potentially exculpatory evidence that might be contained" in the materials sought "does not pass muster."⁹ Regarding classified information specifically, the Court of Appeals for the District of Columbia Circuit has held that classified information "is not discoverable on a mere showing of theoretical relevance in the face of the government's classified information privilege, but . . . further requires that a defendant seeking classified information . . . is entitled only to information that is at least

⁴ See also Military Commissions Trial Judiciary Rules of Court 3.5.m. (1 September 2016).

⁵ R.M.C. 701(c)(1-3), (e); *Brady v. Maryland*, 373 U.S. 83, 88 (1963). Furthermore, "[u]nder *Brady*, . . . prosecutors have an affirmative duty to search possible sources of exculpatory information, including a duty to learn of favorable evidence known to others acting on the prosecution's behalf, . . . and to cause files to be searched that are not only maintained by the prosecutor's or investigative agency's office, but also by other branches of government 'closely aligned with the prosecution.'" *United States v. Safavian*, 233 F.R.D. 12, 17 (D.D.C. 2005). Note, however, that absent "a specific request . . . that . . . explicitly identifies the desired material and is objectively limited in scope," there is no obligation for "prosecutors to search . . . unrelated files to exclude the possibility, however remote, that they contain exculpatory information." *United States v. Joseph*, 996 F.2d 36, 41 (3d Cir. 1993).

⁶ R.M.C. 701(e)(3).

⁷ *United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1993).

⁸ *United States v. Conder*, 423 F.2d 904, 910 (6th Cir. 1970) *cert. denied*, 400 U.S. 958 (1970).

⁹ *United States v. Apodaca*, 287 F. Supp. 3d 21, 40 (D.D.C. 2017).

helpful to the defense of the accused.”¹⁰ Furthermore, the Defense must be able to sufficiently establish that the material sought in fact exists.¹¹ Finally, a Defense discovery request that is overbroad or otherwise objectionable may simply be denied; the Commission is under no obligation to amend or modify the request to render it unobjectionable.¹²

c. As in any criminal case, the Prosecution in a military commission is responsible to determine what information it must disclose in discovery.¹³ “Defense counsel has no constitutional right to conduct his own search of the State’s files to argue relevance.”¹⁴ It is incumbent upon the Prosecution to execute this duty faithfully, because the consequences are dire if it fails to fulfill its obligation.¹⁵

6. Analysis.

a. Mr. Hawsawi requests the Commission compel the Government to produce the following two exhibits which were referenced in the 9/11 Commission Report: (1) FBI Report of the Hijacker’s Timeline, dated 5 December 2003; and (2) FBI Special Agent (SA) Adam Drucker Interview, dated 12 January 2004.¹⁶ In their response, the Government asserts that Trial Counsel previously provided to the Defense the FBI Report of the Hijacker’s Timeline, as well as all material documenting the interview of SA Adam Drucker.¹⁷ As substantiation of their

¹⁰ *United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989) (citing *Roviaro v. United States*, 353 U.S. 53 (1957)).

¹¹ *United States v. Norwood*, 79 M.J. 644, 666 (N-M.Ct. Crim. App. 2019), review granted on other grounds, No. 20-0006/NA, 2020 WL 710633 (C.A.A.F. Jan. 21, 2020) (citing *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004)).

¹² *See, e.g., Benham v. Rice*, 238 F.R.D. 15, 19 (D.D.C. 2006), on reconsideration in part, No. CIV.A. 03-01127, 2007 WL 8042488 (D.D.C. Sept. 14, 2007) (“[I]t is not the court’s function to modify plaintiff’s demands so that, as revised, they are reasonable and legitimate.” *Id.*) (interrogatories in civil case).

¹³ R.M.C. 701(b)-(c); *United States v. Briggs*, 48 M.J. 143 (C.A.A.F. 1998); *Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987).

¹⁴ *Ritchie*, 480 U.S. at 59.

¹⁵ *See United States v. Stellato*, 74 M.J. 473 (C.A.A.F. 2015) (finding no abuse of discretion in military judge’s dismissal with prejudice of charges due to a Prosecution discovery violation); *United States v. Bowser*, 73 M.J. 889 (A.F. Ct. Crim. App. 2014), *summarily aff’d* 74 M.J. 326 (C.A.A.F. 2015) (same).

¹⁶ AE 710 (MAH) at p. 4.

¹⁷ AE 710A (GOV) at p. 4-5.

claim, the Government provided the Bates numbers of the documents turned over in discovery. The Defense did not reply to the Government's response and, therefore, has not refuted the Government's claim that the documents in question were provided to the Defense. Under the circumstances, the Commission finds that the Defense has not met its burden of establishing that the Government has failed to disclose the materials in question to the Defense.

b. Mr. Hawsawi also requests that the Government turn over in discovery an "Intelligence Report, re: Atta, dated 13 September 2001."¹⁸ The Intelligence Report in question apparently details the last phone call Mohammad Atta (one of the 9/11 hijackers) made to his father two days before the attacks of 9/11. Mr. Hawsawi speculates that the Intelligence Report pertaining to the Atta phone call may contain information relevant to his involvement, or lack thereof, in the 9/11 conspiracy. The Government declined to produce the requested exhibit on the grounds that "the Defense has failed to demonstrate how a classified intelligence cable relating to "one last call to his own father on September 9" contains any non-cumulative, relevant, and helpful information that will demonstrate Mr. Hawsawi's advanced knowledge, or lack thereof, of the September 11, 2001 attacks."¹⁹ The Government also indicated that they do not intend to introduce the Atta phone call into evidence at trial. What's more, the Government affirmatively represents they have reviewed the Intelligence Report and determined that it does not contain any relevant or material information. In light of the Government's representation,²⁰ and with the understanding that the Government will not seek to admit evidence at trial related to the Intelligence Report or the phone call in issue, the Commission finds that the Defense has not met

¹⁸ AE 710 (MAH) at p. 4.

¹⁹ AE 710A (GOV) at p. 5-6.

²⁰ The Commission expects the Government to understand and fully comply with its discovery obligations in this case. The Commission will not ordinarily place itself in the position of double checking the Government's work in that regard absent some more persuasive showing by the Defense that the Government has failed to provide discovery of information that is material to the preparation of the Defense.

its burden of demonstrating that the Intelligence Report is material to the preparation of the Defense.

c. Finally, the Defense requests that the Government turn over in discovery an interview of “Ed G,” which is referenced in the 9/11 Commission Report. “Ed G.” apparently provided information to the 9/11 Commission pertaining to al Qaeda’s financing of the 9/11 attacks. The Government asserts in their response to the motion that the interview in question does not mention Mr. Hawsawi in any fashion and that the interview only serves “to rule out potential sources of funding for the September 11, 2001 attacks.”²¹ The Government further contends that the information “is in no way exculpatory and is neither relevant nor helpful to the Defense.”²² Here again, the Government has affirmatively represented that they have reviewed the document in question and have determined that it contains no information that is material to the preparation of the Defense. In the absence of any persuasive evidence or argument to the contrary, the Commission accepts the Government’s representation and will not direct the production of the requested document.

7. **Ruling.** The Defense motion to compel discovery is **DENIED**.

So **ORDERED** this 20th day of April, 2020.

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W. SHANE COHEN, Colonel, USAF
Military Judge
Military Commissions Trial Judiciary

²¹ AE 710A (GOV) at p. 5.

²² *Id.*